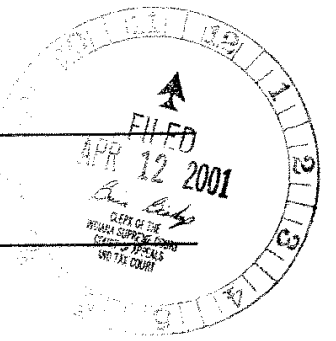
IN THE
INDIANA SUPREME COURT



NO. _____

IRA C. RITTER and THE KROGER CO.,	)	Indiana Court of Appeals No. 49A02-9912-CV-00883
Appellants (Defendants below),	)	
v.	)	Appeal from the Marion Superior Court, No. 10 Cause No. 49D10-9506-CT-0959
JERRY STANTON and RUTH A. STANTON,	)	
Appellees (Plaintiffs below).	)	The Honorable Richard H. Huston, Judge

APPELLANTS' PETITION TO TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

1. Whether a verdict of $67,468,259 for general damages (pain and suffering) is excessive, and in violation of Indiana's "first blush" test, where it is clearly breathtaking in its enormity, 53 times the proven special damages, and exceeds by tens of millions of dollars any other compensatory damages award for comparable personal injuries?

2. Whether a verdict of $67,468,259 for general damages violates due process and/or due course of law when verdicts rendered for comparable injuries provide no notice to this defendant of the magnitude of the potential award?

3. Whether the trial court had subject matter jurisdiction over a claim that is exclusively within the remedies provided by the workers compensation act because Kroger was Stanton's employer at the time of the accident, either as a single employer or a dual employer.

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I. BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

Appellee Jerry Stanton ("Stanton") sustained serious and permanent personal injuries after being pinned between a trailer and a semi-tractor driven by Ira Ritter ("Ritter"), also an employee of The Kroger Company ("Kroger").[1]

Stanton and his wife filed a Complaint for Damages against Ritter and Kroger for his personal injuries and her loss of consortium. (R. 19-22) Kroger moved to dismiss because the trial court lacked subject matter jurisdiction as Stanton's exclusive remedy was under the Indiana Worker's Compensation Act ("Act"). (R. 372) The trial court denied that motion, and the case was tried to a jury on a claim of negligence against Ritter, and respondeat superior against Kroger. (R. 1649, 2277-2321, 1869, 2336-4075) The jury reached a verdict that included $1,281,741 for special damages, and a stunning $67,468,259 for general damages. The Stantons were awarded $55 million in compensatory damages, after the jury found 20% comparative fault. (R. 1897, 4073) Kroger pursued this appeal after its motion to correct errors was denied. (R. 1928-1950, 4077-4113; 2252)

On March 14, 2001, the Court of Appeals affirmed the entire $55 million verdict in a published opinion, holding that the trial court had subject matter jurisdiction; that the Seventh Amendment constrains post-verdict alteration of a jury award; that the damage award was supported by the evidence; that no comparative analysis of the award with other awards for like injuries was necessary; that the damage award was not outrageous; and that Kroger's constitutional claims were without merit.

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[1] Stanton drove for Gateway Freightline Corporation ("Gateway"), a wholly-owned subsidiary of Kroger. There was a contract between Stanton and Kroger through a collective bargaining agreement with the Teamster's.

II. ARGUMENT

A. THE GENERAL DAMAGES AWARD IS EXCESSIVE

The compensatory damages award included $1,281,741 for special damages, and a stunning $67,468,259 for general damages (disfigurement, pain and suffering, ability to function as a whole person, and loss of consortium). The general damages award clearly fails the "first blush" test. On its face the award is huge. It exceeds proven special damages 53-fold and is many multiples higher than awards for comparable injuries. The award is so great that it indicates it was a product of prejudice, partiality, corruption, or other improper element.

1. The Court Of Appeals Was Obligated To Engage In A Meaningful Review Under The First Blush Test Including Considering Comparable Verdicts

The Court of Appeals erroneously concludes that it could not alter this award. However, the authority to reduce excessive verdicts is a recognized part of Indiana law. Ind. Appellate Rule 66(C)(4) and (5)(N)(5)[2] makes it clear that such authority will be exercised in the right case. *See Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977). This is the right case. By any measure, the verdict is excessive and must be reduced.

An award of compensatory damages will be set aside as excessive where the amount of damages is so great it cannot be explained upon any basis other than passion, partiality, prejudice, corruption, or some other improper element. *See Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185, 190 (Ind.Ct.App. 1998), *transfer denied*; *see also Sanders v. City of Indianapolis*, 837 F.Supp. 959, 966 (S.D.Ind. 1992). To warrant reversal, the award "must appear to be so outrageous as to impress the Court at 'first blush' with its enormity." *Kimberlin v. DeLong*, 637 N.E.2d 121, 129 (Ind. 1994), *cert. denied*, 516 U.S. 829 (1995).

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[2] Formerly App.R. 15(N)(5).

To determine whether a compensatory damages award is monstrously excessive, a number of courts have conducted a "comparability analysis," by which they assess whether the award is comparable to awards in factually similar cases. *See*, e.g., *U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1285 (7th Cir. 1995). Indiana has done the same in both the punitive damages context and in evaluating emotional distress damages. *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 562 (Ind.Ct.App. 1999), *transfer denied; cert. denied*, 120 S.Ct. 1424 (2000); *Groves v. First Nat'l Bank of Valparaiso*, 518 N.E.2d 819 (Ind.Ct.App. 1988), *transfer denied.* Even if a "comparability analysis" does not control assessment of individual circumstances, it can provide an objective frame of reference. *Wheat v. United States*, 860 F.2d 1256, 1259 (5th Cir. 1988).

2. The 7th Amendment Does Not Preclude A Consideration Of Verdicts In Comparable Cases

The Court of Appeals' Opinion erroneously concludes that the 7th Amendment constrains the ability to perform a post-verdict alteration of the award. (Opinion, p. 26) However, the 7th Amendment cannot constrain judicial review of this state court verdict because the 7th Amendment governs proceedings in federal court, not state court. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 2222 (1996), citing *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876). Nevertheless, under a 7th Amendment analysis, the U.S. Supreme Court has found that the "fair administration of justice" must be balanced against the right to jury trial found in the 7th Amendment. *Gasperini*, 116 S.Ct. at 2223. The Supreme Court has also found that jury discretion must have an "upper limit". *Id.*

Moreover, federal courts have recognized that a comparability analysis should be employed where a verdict is "monstrously excessive" and materially deviates from prior, similar verdicts. *See*, e.g., *Miksis v. Howard*, 106 F.3d 754 (7th Cir. 1997); *Sanders v. City of*

Indianapolis, 837 F.Supp. at 966. Thus, the Court of Appeals' Opinion conflicts with federal decisions and significantly departs from 7th Amendment law. App.R. 57(H)(3), (6). Although Kroger demonstrated how this award materially deviates from comparable circumstances and awards, the Court of Appeals declined to engage in the precise analysis found to be appropriate under the 7th Amendment.

3. The Court of Appeals Ignored Comparable Cases That Reflect Substantially Lower Awards[3]

The size of this verdict warrants a remittitur or a new trial. Kroger recognizes that "[t]raditionally, the jury is afforded a great deal of discretion in assessing damage awards." *Slone*, 695 N.E.2d at 190. A jury's discretion in determining damages however, "is not limitless." *Slone*, 695 N.E.2d at 190. Where an award is so great that it indicates prejudice, partiality, corruption, or other improper element, it is excessive, and should be reduced. *Id.*

The burden of proving the amount of damages rests with the plaintiff. *Daly v. Nau*, 167 Ind.App. 541, 339 N.E.2d 71, 78 (1975). In addition to incurring $1,281,741 in special damages, Stanton proved he was entitled to general damages for disfigurement; loss of ability to function as a whole person, and for pain and suffering. Plaintiffs also demonstrated that Stanton's wife suffered a loss of consortium. The issue is whether the jury's award of $67,468,259 for these losses is excessive. The general damages awarded in this case are huge. The award is roughly

[3] Certainly, there are much lower verdicts for similar serious injuries. Kroger has restricted its review to those cases that have the **highest** awards for similar injuries.

53 times the amount of proven special damages.[4] It far exceeds comparable cases. The award is clearly the product of some improper element and should be reduced.[5]

Though it is difficult to compare injuries and damages from one case to the next, a recognized method to assess whether damages are excessive is to use a comparability analysis. *Littlefield v. McGuffey*, 954 F.2d 1337, 1348 (7th Cir. 1992). Although individual circumstances will differ, a "comparability analysis" can provide an objective frame of reference. *Wheat v. United States*, 860 F.2d at 1259. There are few reported cases in Indiana in which juries have awarded compensatory damages in excess of $4,000,000 for grievous injuries.

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[4] Kroger does not suggest a multiple of special damages, standing alone, is dispositive of an excessiveness issue. It may be, however, a guide in determining reasonableness and a fair award.

[5] One explanation for the size of the verdict is Stantons' counsel's closing argument. Prior to trial, Stantons' counsel conceded there was no factual basis for punitive damages. (R. 49) However, at trial counsel inflamed passion against Kroger and inferred that Kroger should be punished:

> There's another truck poised and ready to crush Jerry Stanton. And the only thing that's going to stop Kroger from running over him a second time are the six of you. Because that's what they [Kroger] intend to do ... .

(R. 3980)

> They're [Kroger] going to ask you to join in getting in the cab of that truck and running over Jerry a second time. ... Make no mistake about it that's what they intend to do.

(Id.)

This closing argument was a direct invitation to the jury to ignore the law and punish Kroger or to base its award on sympathy. Plaintiffs' closing statements were made despite knowing the jury would be instructed that Kroger would be liable, if at all, under a respondeat superior theory. (R. 1869) While courts usually see nothing "unfair" in comments of counsel to persuade a jury, they do not accept "deliberate distortions." *White v. State*, 541 N.E.2d 541, 549 (Ind.Ct.App. 1989); *see also Budget Car Sales v. Stott*, 656 N.E.2d 261 (Ind.Ct.App. 1995), *transfer denied*, (argument referencing letter not in evidence was improper); *CSX Transp. Inc. v. Levant*, 417 S.E.2d 320 (Ga. 1992), (reversed $1,000,000 general damages award after a similar closing argument because it "could only be explained as having a punitive cause" and the verdict raised "an irresistible inference that . . . [a]n improper cause invaded the trial.").

How does the award of $67,469,259 in general damages compare to other cases? No verdict for general damages even comes close. In fact, rarely have awards of special damages **and** general damages exceeded $8 million.

In *Miksis v. Howard*, a 21-year-old worker in a bucket truck was struck by a tractor-trailer. *Miksis v. Howard*, 106 F.3d 754 (7th Cir. 1997). The plaintiff sustained brain damage, lost the ability to control his legs, could not eat or breathe without assistance, was unable to speak or walk, and was incontinent. Although he regained some of his mobility, he continued to experience difficulty balancing, had only limited movement in his legs and left arm, and had deficits in auditory comprehension, memory, the ability to process information, and problem solving. Miksis claimed $830,000 in past medical expenses. The jury awarded $10,000,000, but like here assessed 20% comparative fault, thereby reducing the award to $8,000,000. Assuming that 80% of special damages were awarded, the remainder ($7,336,000) was for general damages and would have a present value of $8,019,540.[6]

In *Dayton Walther Corp. v. Caldwell*, 273 Ind. 191, 402 N.E.2d 1252, 1254-55 (1980), a 21-year-old woman was severely injured in a head-on collision. She suffered traumatic injuries to her face and head, including a fractured skull. Forty grams of brain tissue were removed. Bone structures, muscles, and nerves around the eyes, nose, and sinuses were destroyed. She lost her sense of smell and taste, 59% of her sight, and suffered from permanent pain, headaches, and facial scarring. The jury awarded $800,000 in compensatory damages. In today's dollars, the award would be worth $1,835,813.

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[6] Adjustments for inflation were calculated using the inflation calculator found on the Bureau of Labor Statistics website, http://stats.bls.gov/cpihome.htm.

In *Bernard v. Roy Ins. Co.*, 586 So.2d 607 (La.Ct.App. 1991), the plaintiff's leg got trapped in the door of a bus as she attempted to board. The bus dragged her and then ran over her right leg. Her thigh "burst open". Her leg was mutilated and nearly torn from her body. Bernard believed she might bleed to death. She was hospitalized for months and underwent innumerable surgeries, skin and muscle grafts, and debridements. Bernard had constant pain after the accident, a romantic relationship ended, and she suffered from general depression. The jury returned a verdict of $14,148,594. Recognizing excessiveness review standards similar to Indiana's, the Louisiana Court of Appeals found the verdict was excessive. *Id.* at 612. The Court reduced the $6,525,000 general damages award to $5,025,000, finding it was "the largest award within the factfinder's discretion." *Id.* at 619. The Stantons' general damages exceed Bernard's by well over thirteen (13) times for injuries (including pain and suffering) of the same character. Even adjusting the $5,025,000 award to reflect today's dollars ($6,405,240), the verdict here is still more than ten (10) times that amount.

A New York appellate court also reduced an excessive award for injuries comparable to those sustained in this case. In *Chung v. New City Transit Authority*, 583 N.Y.S.2d 476 (N.Y.App.Div. 1992), a verdict of $61,266,600 was awarded. Plaintiff's legs were severed by a subway after he fell from a platform. Total damages were reduced to $2,785,600, with $1,300,000 for future and past pain and suffering. The $1,300,000 general damages component has a present value of $1,657,080.

In its Briefs to the Court of Appeals, Kroger cited to similar cases where the injuries sustained were similar to or arguably more devastating than those presented here. (*See* Brief of Appellants, pp. 33-39) In addition, in its Motion to Correct Errors, Kroger presented research on awards and settlements in Indiana from recent years for cases involving paraplegia, quadriplegia,

and brain damage. (R. 2096 *et seq.*) Present value of the awards ranged in size from $100,000 to $8,500,000. Finally, Kroger cited to its review of jury verdicts from 1995-1999 that disclosed that in cases where juries awarded total damages in excess of $1 million to a husband and wife for injuries the husband received in a vehicular accident and for the wife's loss of consortium, the average total award was slightly under $4 million, and the highest award was $7,889,000 ($6,960,000 for pain and suffering), plus $696,000 for loss of consortium. *Thomas v. Brown*, 1997 WL 636031 (Gadsden County Circuit Court, Fla., 1997). In today's dollars, the general damages award would be $7,946,972. The highest loss of consortium award reported was $2 million. *Neill v. Wal-Mart Stores, Inc.*, 1999 WL 1495259 (Dallas County, Tex., 1999). (*See* chart summarizing awards for comparable injuries, Brief of Appellants, pp. 38-39).

The general damage and consortium award to the Stantons is nearly nine (9) times the highest amount awarded during the last five years to a husband and wife for injuries received in a vehicular accident. Moreover, the award is more than nine (9) times the highest Indiana verdict. The size of this award has only occurred in the case of punitive damages or proven life care expenses (not the case here). *See*, e.g., *Ammerman*, 705 N.E.2d 539 (total verdict of $62.4 million, including $58 million in punitive damages, $1,251,757 in special damages, and $3,150,000 general damages).

Although the nature of the injuries justifies a large damage award, any award of compensatory damages must be reasonable as the jury was instructed. (R. 1880) Even if Stanton's physical injuries were the worst reported, a total award of $15,000,000 would exceed by several million dollars any comparable general damages judgment in Indiana. Such an award would be "the largest award within the factfinder's discretion." *See Bernard*, 586 So.2d at 619.

When a court on appeal finds that a verdict violates the "first blush" test and/or that the trial court abused its discretion in not granting remittitur, the Court has the authority under Appellate Rule 66(C)(4) and (5) to fashion a remedy. The use of remittitur by trial and appellate courts to set aside verdicts that are "clearly disproportionate to community expectations" is a recommended method of controlling unrealistic awards. American Bar Assoc., *Report of the Action Commission to Improve the Tort Liability System*, 13 (1987). This Court should order a new trial or a new trial subject to remittitur.

B. A JUDGMENT FOR GENERAL DAMAGES OF THIS SIZE VIOLATES DUE PROCESS AND DUE COURSE OF LAW CONSTITUTIONAL PROTECTIONS

The unfettered right to a jury trial in civil cases does not equate to a jury's unfettered right to award any amount of damages. A jury's discretion in determining damages "is not limitless." *Slone*, 695 N.E.2d at 190. T.R. 59(J)(5) and App.R. 66(C) give courts the legal duty to remit excessive damages, yet these long-standing rules were not even addressed by the Court of Appeals' Opinion. If review demonstrates that a defendant "did not receive adequate notice of the magnitude of the sanction", due process indicates that the verdict is excessive. *See Ammerman*, 705 N.E.2d at 562.

This award violates due process protection afforded by the 14th Amendment and due course of law protection afforded by Art. 1, § 12 of the Indiana Constitution. No previous general damage verdict, even for cases with injuries as serious as these, provides any inkling of notice that this verdict was possible or reasonable. Kroger had the right to rely on existing case law which showed the highest comparable verdicts in the range of $3-7.5 million. Kroger had no due process notice that $67,468,259 in general damages was anywhere close to the range of possibility.

If $67,468,259 is the new benchmark for general damages, then even responsible individuals and corporations are grossly underinsured because present coverages are predicated on general damage awards substantially lower than awarded in this case. Recent Indiana decisions reflect the importance of insurance coverage "to avoid unexpected liabilities." *See Hanson v. St. Luke's United Methodist Church*, 704 N.E.2d 1020, 1025 (Ind. 1998). The arbitrariness and resultant unpredictability of a pain-and-suffering award of this magnitude undermine the deterrence function of the tort system and increase insurance costs. Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L.REV. 773, 786 (1995).

There comes a time when appellate courts must step in and declare a judgment to be excessive. This is the time and the judgment. This Court should step in and bring reason to the award. The general damage award must be remitted or a new trial granted.

C. THE COURT OF APPEALS' DECISION ERRONEOUSLY DECIDES A NEW QUESTION OF LAW AND/OR CONTRAVENES RULING PRECEDENT BY NOT APPLYING THE EXCLUSIVITY PROVISION OF THE WORKER'S COMPENSATION ACT

1. Introduction

The trial court lacked subject matter jurisdiction because of the exclusivity provision of the Indiana Worker's Compensation Act ("the Act"). Ind.Code § 22-3-2-6; *Williams v. R.H. Marlin, Inc.*, 656 N.E.2d 1145, 1150 (Ind.Ct.App. 1995). Furthermore, the Act makes it clear that an employee may be "in the joint service of two (2) or more employers" and the employee's remedies remain exclusive under the Act even in such dual situations. Ind.Code § 22-3-3-31; *see DeGussa Corp. v. Mullins*, 2001 WL 267766 (Ind. 2001).

2. An Employee Of A Wholly Owned Subsidiary With An Employment Contract With The Parent Is An Employee Of The Parent

Prior to 1995, when employees of a parent and subsidiary corporation injured each other during their employment, the fact that the corporations were interconnected often resulted in a finding that worker's compensation was the sole and exclusive remedy. *See*, e.g., *U.S. Metalsource Corp. v. Simpson*, 649 N.E.2d 682 (Ind.Ct.App. 1995). In 1995, this Court decided *McQuade v. Draw Tite, Inc.*, 659 N.E.2d 1016 (Ind. 1995), which found that interconnectedness of a parent and subsidiary alone could no longer support a finding that the employees of a parent and a subsidiary were the employees of a single employer. Thus, an employee of a subsidiary could sue the employee of the parent, and the parent, for negligence. This Court concluded: "there is little likelihood that equity will ever require us to pierce the corporate veil to protect the same party who erected it." *McQuade*, 659 N.E.2d at 1020.

Nevertheless, this Court also stated: "Defendant does not claim that it had an express or implied employment contract with Plaintiff. Rather, its claim is based solely on interconnectedness with [its subsidiary]." *McQuade*, 659 N.E.2d at 1019, n.4. In raising the exclusivity provision of the Act, Kroger does not rely solely on the substantial interconnectedness[7] with Gateway. (Appellants' Brief, pp. 14-17) In addition, Kroger had an employment contract with Stanton in the form of a collective bargaining agreement.

While the Court of Appeals found a level of interconnectedness, it opined that it was unsure this Court meant to create an exception to *McQuade*. (Opinion, p. 13-15) Further, the Court of Appeals found no express employment contract, but was silent on the question of whether there was an implied employment contract. The Opinion concluded that a collective

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[7] The facts demonstrating interconnectedness are found in Kroger's Briefs filed in the Court of Appeals. (Brief of Appellants, pp. 13-17)

bargaining agreement is not always an express or "direct" employment contract, because such contracts are often at-will. (Opinion, p. 18, 22)

The Court of Appeals' conclusion is inapplicable here. Not only did Stanton have substantial benefits under the Kroger Master Agreement (R. 447, 428-30, 484), he also had protection from outsourcing (R. 727), grievance rights (R. 719), and re-employment benefits with full seniority if Kroger closed Gateway. (R. 718, 734) Most importantly, **Stanton was not employed at will, but rather could only be discharged for cause.** (R. 721) Gateway employees ratified the Kroger Master Contract in order to obtain these benefits. (R. 423)

Whether the *McQuade* footnote creates an exception is a dispositive issue that is squarely presented. The facts demonstrate both a high level of interconnectedness between parent and subsidiary and an express or implied employment contract. The Court of Appeals erroneously decided this new question of law.

The maxim that one who accepts the benefits of a contract must bear its burdens applies here. *See Jobes v. Tokheim Corp.*, 657 N.E.2d 145, 150 n.6 (Ind.Ct.App. 1995) (member of union, as recipient of the benefits and protections of collective bargaining agreement, bound by its limitations); *Bentz Metal Products Co., Inc. v. Stephans*, 657 N.E.2d 1245, 1249-50 (Ind.Ct.App. 1995) (employee covered by collective bargaining agreement recognized as party to an at-will employment contract with company); *Moen v. Director of Div. of Employment Sec.*, 85 N.E.2d 779, 781-82 (Mass. 1949) (employee is "bound by the agreement made on his behalf by the union to the same extent as though he had entered into it individually"). Kroger was Stanton's employer within the meaning of *McQuade*.

3. The Opinion Contravenes This Court's Decision In *DeGussa v. Mullens*

The Court of Appeals further held that *McQuade* also precludes a finding of dual employment in the case of a parent and subsidiary. (Opinion, p. 23 n.4) This holding contravenes *DeGussa v. Mullens*, decided two days after the decision in this case. In *DeGussa*, this Court applied the *Hale* dual-employment factors[8] in a parent-subsidiary relationship. *See DeGussa*, 2001 WL 267766, *5-7. If Kroger and Gateway are separate employers under *McQuade*, Kroger must be allowed to show dual employment.

Application of the *Hale* factors was recently refined in *GKN Co. v. Magness,* 2001 WL 244110 (Ind. 2001). In *GKN*, this Court found the *Hale* factors are to be weighed against each other as part of a balancing test. *Id.* at *3.

Application of the *Hale* factors in this case[9] compels a finding of dual employment. Because Kroger wholly owned Gateway, it had the right to indirectly discipline Gateway employees. (R. 483-84) The right to discipline need not be exclusive. *GKN*, at *5. Kroger provided the working capital to fund Gateway's operating budget,[10] including salaries of Gateway drivers, and supplied Gateway with tractors and trailers. (R. 482-84, 770, 1375-79) Kroger prepared the delivery schedule for Gateway drivers, including Stanton. (R. 483, 229) Although Stanton believed he was a Gateway employee, he knew that 99% of his deliveries were for Kroger, that he received Kroger benefits, and that for six months prior to the accident, his

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[8] *Hale v. Kemp*, 579 N.E.2d 63, 67 (Ind. 1991).

[9] Because the trial court did not conduct an evidentiary hearing before ruling on Kroger's motion to dismiss, and thus ruled on a paper record, this Court reviews that ruling *de novo*. *GKN*, 2001 WL 244110 at *3.

[10] All of Gateway's income was transferred to Kroger on a daily basis. (R. 770)

employment was governed by a collective bargaining agreement between Kroger and his union. (R. 423-32, 445-46) These facts clearly establish dual employment under the *GKN* test.

For the above-stated reasons, the exclusive remedy provision should be applied. Transfer should be granted, the Court of Appeals' Opinion vacated, and judgment should be entered for Kroger.

III. CONCLUSION

For the foregoing reasons, Kroger requests that this Court grant transfer, vacate the jury's verdict, and remand with instructions to dismiss the Stantons' Complaint for lack of jurisdiction. In the alternative, Kroger requests that this Court order a new trial or a new trial subject to remittitur.

Respectfully submitted,

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